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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION

CISCO SYSTEMS, INC.,

Plaintiff,

vs.

ARISTA NETWORKS, INC.,

Defendant.

CASE NO. 5:14-cv-5344-BLF (NC)

**CISCO'S AMENDED PROPOSED
PRELIMINARY INSTRUCTION NO. 12**

Date: November 22, 2016
Dept: Courtroom 3 - 5th Floor
Judge: Hon. Beth Labson Freeman

As represented to the Court at the November 21, 2016 conference (*see* Tr. 257:4-17), Cisco has amended its proposed Preliminary Jury Instruction No. 12 to provide the jury with a high-level backdrop of protected and unprotected matter under copyright law as relevant to this case. This amended proposed instruction differs from the one that Cisco filed pursuant to the Parties' Third Amended Stipulated and Proposed Jury Instructions, *see* ECF No. 674 at 23, in that it has taken account of the Court's suggestions at the November 21, 2016 conference. In an effort to advance the Court's analysis of this proposed instruction, Cisco used Arista's proposed Preliminary Instruction No. 12 as a model.

Cisco maintains its arguments set forth in its position on Arista's proposed Preliminary Instruction No. 12 as to the deficiencies of Arista's proposed instruction, which are fully incorporated herein (*see* ECF No. 674 at 24-27). For example, Arista's proposed instruction would instruct the jury as to what is *not* protectable without instructing the jury as to what *is* protectable. *See Harper House, Inc. v. Thomas Nelson, Inc.*, 889 F.2d 197, 207 (9th Cir. 1989) (jury instructions erroneous where they "did not adequately explain to the jury which material was, in fact, protectable"). Thus, Cisco's amended proposed Preliminary Instruction No. 12 addresses both protectable and unprotectable materials in a balanced fashion.

DISPUTED: Cisco's Preliminary Instruction No. 12 re Protected and Unprotected Matter

Copyright law allows a copyright owner to prevent others from copying the original elements of his or her copyrighted work. These original elements are "protected matter" under copyright law. An "original" element in a copyrighted work is one that was created by the work's author by use of at least some minimal creativity. In addition, the use of a process by which an author exercises his or her judgment and expertise in creating an element may render that element "original."¹

¹ ECF No. 482 at 12-13; *CDN Inc. v. Kapes*, 197 F.3d 1256, 1260 (9th Cir. 1999) (affirming district court's finding that "[t]he evidence indicates that the plaintiff uses its considerable expertise and judgment to determine how a multitude of variable factors impact upon available bid and ask price data. And it is this creative process which ultimately gives rise to the Plaintiff's 'best

1 Elements to which copyright protection does not extend are called “unprotected matter.”
 2 Unprotected matter is not entitled to copyright protection and therefore may be copied by another
 3 author.

4 During this trial, you will be asked to consider Cisco’s copyrighted works. In so doing,
 5 you will be asked to consider certain protected matter, and to not consider certain unprotected
 6 matter, within Cisco’s works. Here are a few examples.

- 7 1. You will not be asked to determine whether any individual word standing alone is
 8 protected by copyright. However, a combination of words, even ordinary words,
 9 may be protected by copyright if that combination shows a spark of creativity.
- 10 2. You will not be asked to consider any matter that is not original to Cisco.
- 11 3. You will not be asked to determine whether any matter, standing alone, is in the
 12 public domain and thus not protectable. However, a creative combination of works
 13 from the public domain may be protectable.
- 14 4. You will not be asked to determine whether an idea, concept, principle, discovery,
 15 fact, actual event, process, or method is protected by copyright. However, an
 16 author’s particular expression of an idea, concept, principle, discovery, fact, actual
 17 event, process, or method may be protectable. For example, the general idea of
 18 using a grammatical structure such as [verb] [object] [noun] is not protectable, but a
 19 particular creative expression that consists of a verb, an object and a noun may be
 20 protectable.
- 21 5. The underlying function of any element of Cisco’s works is not protectable by
 22 copyright law, but Cisco’s particular expression of an element of a copyrighted
 23 work that is functional is entitled to copyright protection as long as the author had
 24 multiple ways to express the underlying idea.

25 At the end of this trial, I will provide you with more detailed instructions on protectable and
 26 unprotectable matter.

27 _____
 28 guess’ as to what the current ‘bid’ and ‘ask’ prices should be. As such, the Court finds that these
 prices were created, not discovered.””).

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2 Dated: November 21, 2016

Respectfully submitted,

3 /s/ John M. Neukom

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